DATE: September 29, 1993
CASE NO. 91-ERA-4

IN THE MATTER OF

LINDA PORTER,

COMPLAINANT,

v.

BROWN & ROOT, INC.,

and

TEXAS UTILITIES,

RESPONDENTS.

BEFORE: THE SECRETARY OF LABOR

ORDER TO SHOW CAUSE

Before me for review is the Order Granting An Interlocutory Appeal issued by the Administrative Law Judge (ALJ) on June 8, 1993, in this case arising under the employee protection provisions of the Energy Reorganization Act of 1974, as amended (ERA), 42 U.S.C. § 5851 (1992), and the Toxic Substances Control Act (TSCA), 15 U.S.C. §2622 (1988).

Before the ALJ, the parties submitted a Joint Motion Requesting Approval of Settlement and Stipulation to Dismissal of Complaint with Prejudice, with a copy of the fully executed settlement agreement attached thereto. The ALJ reviewed the terms of the agreement and found them acceptable, but for the parties' request concerning the sealing of portions of the record. The parties conditioned the settlement on the issuance of an Order providing that certain documents be placed in a

restricted access portion of the file pursuant to 29 C.F.R. §18.56. Consequently, the ALJ issued an Order, dated June 4, 1993, in which he sealed the terms of the settlement agreement, declined to seal portions of the record which indicate the existence of a settlement agreement, and granted the parties' request that the issue of sealing portions of the record be

certified for interlocutory appeal to the Secretary. The June 8 Order Granting an Interlocutory Appeal, states, "Pursuant to my order entered June 4, 1993 and in accordance with 28 U.S.C. § 1292(b), the record in this case is hereby certified for interlocutory appeal to the Secretary of the Department of Labor." Order Granting an Interlocutory Appeal at 1. [1]

Subsequent to the ALJ's forwarding this case to the Secretary, Complainant's Motion for Remand was received on September 13, 1993, urging the Secretary to remand the case to the ALJ for completion of the hearing process. Complainant's Motion for Remand states that no recommended decision has been issued by the ALJ and there is no basis for the case to be before the Office of Administrative Appeals. [2]

There is no provision for interlocutory appeals to the Secretary, either in 29 C.F.R. Part 24, the regulations implementing the ERA, or the Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges, 29 C.F.R. Part 18. Although certifying a controlling question of law to the Secretary of Labor pursuant to the provisions at 28 U.S.C. § 1292(b) may be considered an appropriate exercise of authority by the ALJ, *see* 29 C.F.R. §§ 18.1(a), 18.29(a), I decline to exercise any discretion I may have to entertain such an appeal.

Interlocutory appeals are generally disfavored and the Courts, as well as the Secretary, have held that there is a "strong policy against piecemeal appeals . . . ." *Admiral Insurance Co. v. United States District Court for the District of Alabama*, 881 F.2d 1486, 1490 (9th Cir. 1989); *Shusterman v. Ebasco Services, Inc.*, Case No. 87-ERA-27, Sec. Ord. Denying Remand, July 2, 1987, slip op. at 2. To date, the Secretary has refused to accept interlocutory appeals. *See Manning v. Detroit Edison Corp.*, Case No. 90-ERA-28, Sec. Ord. Denying Permission to File Interlocutory Appeal, Aug. 23, 1990, slip op. at 2-4; *Shusterman* at 2; *Plumley v. Federal Bureau of Prisons*, Case No. 86-CAA-6, Sec. Ord. Denying Interlocutory Appeal, April 29, 1987, slip op. at 2-6; *Malpass and Lewis v. General Electric Co.*, Case Nos. 85-ERA-38, 39, Sec. Ord. Denying Request for Stay Pending Appeal, Dec. 20, 1985.

I am not prepared to establish a new precedent by granting an interlocutory appeal in the present case. Nevertheless, I recognize the futility of remanding the case for further

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consideration by the ALJ in these circumstances. The parties were afforded an opportunity to brief the issues before the ALJ's issuance of the order. The ALJ's Order of June 4, 1993 thoroughly addresses the issues presented by the parties' Joint Motion Requesting Approval of Settlement and Stipulation to Dismissal of Complaint with Prejudice. Moreover, Complainant's Motion for Remand raises questions about Complainant's position on the Joint Motion and settlement agreement filed before the ALJ, and a clarification is necessary. For these reasons, therefore, and in the interest of administrative efficiency, I propose to treat the ALJ's Order of June 4, 1993 as his Recommended Decision and Order in this case, unless the parties show cause within 20 days of receipt of this order why I should

not proceed with my review of this case pursuant to Section 24.6(b).

Accordingly, the request for an interlocutory appeal of the ALJ's order is denied, and the parties are ordered to show cause within 20 days of receipt of this order, why the ALJ's Order of June 4, 1993 should not be reviewed as the Recommended Decision

and Order in this case, pursuant to Section 24.6(a) and (b), and why the Secretary should not proceed to issue a briefing schedule in this case.

SO ORDERED.

ROBERT B. REICH
Secretary of Labor

Washington, D.C.

[ENDNOTES]

[1] All documents in the record which indicate the existence of a settlement agreement in this case, including the June 4 Order of the ALJ, were forwarded under seal, even though the ALJ recommended granting only the parties' request that the settlement agreement be sealed, and recommended denying the request to seal any other documents in the file that mention the settlement.

[2] The Office of Administrative Appeals is responsible for assisting the Secretary of Labor in performing his adjudicatory responsibilities in issuing decisions in whistleblower cases.